The Party Presentation Rule

By, Therese Shanks

In litigation, as in life, hindsight is 20/20. The best arguments we ever give are the ones that occur to us on the drive away from the courthouse. Sometimes, however, the best arguments for a case are the ones the judges come up with on their own. What happens when a judge decides a case based on an issue neither party briefed or argued? Generally, the appellate courts will not consider arguments raised by a ***litigant*** for the first time on appeal. *Dermody v. City of Reno*, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997). However, the party presentation rule comes into play when a case is decided by a judge on an issue neither party raised below.

The Nevada Supreme Court recently addressed this rule in *Nevada Policy Research Institute, Inc. v. Miller,* 140 Nev., Adv. Op. 69, 558 P.3d 319 (2024). "The principle of party presentation sets forth that courts rely on the parties to frame the issues of a given matter." *Id.* This rule arises from a belief that courts should remain "passive instruments of government," that do not "sally forth each day looking for wrongs to right." *U.S. v. Sineneng-Smith,* 590 U.S. 371, 375-76 (internal citations and quotations omitted).

The party presentation rule provides parties opportunities to respond to the arguments against their position, by requiring that they be raised by the opponent and not by the court. *Erdman v. City of Madison*, 91 F.4th 465, 472–73 (7th Cir. 2024). It also protects lower courts from being reversed "on grounds that were never urged or argued before them," and ensures trials remain "the main event and not simply a tryout on the road to appellate review." *United States v. Dowdell*, 70 F.4th 134, 140–41 (3d Cir. 2023).

But, as the Nevada Supreme Court held in *Nevada Policy Research Institute,* the rule is not a total bar. 558 P.3d at 331. Courts may "'consider an issue antecedent to . . . and ultimately dispositive of the issue before it, even an issue the parties fail to identify and brief.'" *Id.* (quotations omitted). What does this mean?

Nevada Policy Research Institute is a separation of powers case that challenged the right of employees of public education systems in Nevada, part of the executive branch, to serve as legislators and/or public defenders while maintaining their public employment. 558 P.3d at 324-35. The theory advanced by the parties was that their employment either did, or did not, fall within the dual-employment doctrine and the parties' briefing focused on whether that doctrine applies only to public ***officers,*** which none of the defendants were in their employment, or to public employees in general. *Id.* at 325. The district court added a new theory into the mix when it was deciding the question, however, and applied the common law doctrine of incompatible offices to determine whether the employment was incompatible with the defendants' legislative offices. *Id.* The Nevada Supreme Court held that this was fine, because this theory was within the scope of the theories advanced by the parties, albeit a slightly different application of the law. *Id.* at 331. It held that if the issue itself is brought by the parties, "the court is not limited to particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Id.*

Other examples of when the party presentation rule did not apply include when a court sua sponte found that the statute a private party was purporting to enforce did not include a private right of action. *Bernacchi v. First Chicago Ins. Co.,* 52 F. 4th 324, 328-29 (7th Cir. 2022). In another case, the court refused to apply the party presentation rule where a lower court granted summary judgment based upon one of many exceptions to local government Fourth Amendment liability under *Monell* – just not the one that was specifically briefed. *Torcivia v. Suffolk Cnty., N.Y.,* 17 F.4th 342, 356 n.4 (2d Cir. 2021).

Hopefully these cases are helpful because, if I am being honest, I am not certain where the line lies on what qualifies as "antecedent" or "related" enough to an issue to bar application of the party presentation rule. Both SCOTUS and the Nevada Supreme Court have simply provided that the rule is merely "supple." *Sineneng-Smith,* 590 U.S. at 376; *Nev. Policy Research Inst.,* 558 P.3d at 331. How "supple" it is appears to depend on the facts of each case.

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